Supreme Court, U.S.
FILED

94 731 OCT 20 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT P. KENNEDY
Counsel of Record
FEISAL AMIN ISTRABADI
SPANGLER, JENNINGS
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

JOHN S. DULL
DULL AND DUGGAN
8300 Mississippi Street
Suite F
Merrillville, Indiana 46410
(219) 769-2875

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I.

Whether the Court of Appeals has acted unconstitutionally by ignoring existing Indiana law and eliminating Indiana statutory and common-law defenses and limits of liability in a case involving exclusively questions of Indiana State law.

II.

Whether the Court of Appeals' gross errors in distorting and manipulating the law and facts of this case, upon which errors it then based its Opinion, constitute such an egregious departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power (Supreme Court Rule 10.1(a)).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I.	
THE COURT OF APPEALS HAS ACTED UNCONSTITUTIONALLY BY IGNORING EXISTING INDIANA LAW AND ELIMINATING INDIANA STATUTORY AND COMMON-LAW DEFENSES AND LIMITS OF LIABILITY IN A CASE INVOLVING EXCLUSIVELY QUESTIONS OF INDIANA STATE LAW	5
A. THE COURT OF APPEALS HAS UNCONSTITUTIONALLY ELIMINATED DEFENSES MADE AVAILABLE UNDER THE STATUTES AND COMMON-LAW OF THE STATE OF INDIANA IN A CASE IN WHICH THE ONLY ISSUES RAISED INVOLVED QUESTIONS OF INDIANA STATE LAW	6
B. THE COURT OF APPEALS HAS ACTED UNCONSTITUTIONALLY IN REFUSING TO ENFORCE AN INDIANA STATUTE LIMITING THE LIABILITY OF THE DEFENDANT WHERE THE ONLY ISSUE RAISED IN THIS CASE INVOLVED QUESTIONS OF INDIANA STATE LAW	10

II.

THE COURT OF APPEALS' GROSS ERRORS IN DISTORTING AND MANIPULATING THE LAW AND FACTS OF THIS CASE, UPON WHICH ERRORS IT THEN BASED ITS OPINION, CONSTITUTE SUCH AN EGREGIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER (SUPREME COURT RULE 10.1(a)) 14

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:	PAGE
Andis v. Hawkins, 489 N.E.2d 78 (Ind.App. 1986) .	11, 12
Barger v. State of Indiana, 991 F.2d 394 (7th Cir. 1993)	6
Barringer v. State of Idaho, 727 P.2d 1222 (Idaho 1986)	13
Beckett v. Clinton Prairie School Corporation, 504 N.E.2d 552 (Ind. 1987)	7, 8
Bova v. Roig, 604 N.E.2d 1 (Ind.App. 1992) ...	11
Breese v. State, 449 N.E.2d 1098 (Ind.App. 1983) .	9
Buffalo v. Buffalo, 441 N.E.2d 711 (Ind.App. 1982) .	11, 12
City of Alexander v. Allen, 552 N.E.2d 488 (Ind. App. 1990)	7
City of Austin v. Cooksy, 570 S.W.2d 386 (Tex. 1978)	13
City of Bloomington v. Kuruzovich, 517 N.E.2d 408 (Ind.App. 1987)	7
Colby v. J.C. Penney Co., Inc., 811 F.2d 1119 (7th Cir. 1987)	6
Cole v. Indiana Department of Correction, 616 N.E.2d 44 (Ind.App. 1993)	9
Erie R. Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	4, 5, 9, 13
Fowler v. Norways Sanatorium, 112 Ind.App. 347, 42 N.E.2d 415 (1942)	9
Gibson v. Gary Housing Authority, 754 F.2d 205 (7th Cir. 1985)	13

Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988) 5, 6

Indiana State Highway Commission v. Morris, 528 N.E.2d 468 (Ind. 1988) 13

Madisonville Independence School District v. Kyle, 658 S.W.2d 149 (Tex. 1983) 13

Mauller v. City of Columbus, 552 N.E.2d 500 (Ind. App. 1990) 7

McCoy v. Richards, 711 F.2d 1108 (7th Cir. 1985) . 6

McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991) . 8, 9

Montgomery v. Farmer's Ins. Group, 585 F.Supp. 618 (S.D.Ind. 1984) 12, 13

New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) . 14

Peeler v. Village of Kingston Minds, 862 F.2d 135 (7th Cir. 1988) 6

Roddel v. Town of Flora, 580 N.E.2d 255 (Ind. App. 1991) 7

Sellersburg Volunteer Fire Dept., Inc. v. Edwards, 463 N.E.2d 508 (Ind.App. 1984) 7

St. Anthony Medical Center, Inc. v. Smith, 592 N.E.2d 732 (Ind.App. 1992) 11

West v. American Telephone and Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940) . 6

STATUTES:

Federal:

28 U.S.C.A. § 1254(1) 2

28 U.S.C.A. § 1367(a) 4

42 U.S.C.A. § 1983 4

State:

Ind. Code § 27-12-14-3 ..... 2, 10

Ind. Code § 34-4-16.5-4 ..... 2, 10

Ind. Code § 34-4-33-8 ..... 2, 7

RULES:

Supreme Court Rule 10.1(a) 5, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

County of Lake, Indiana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-13a) is reported at 30 F.3d 847. The decision of the district court (App., *infra*, 14a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Indiana Comparative Fault Act, Ind. Code § 34-4-33-8 (Burns 1986), the Indiana Tort Claims against Governmental Entities Act, Ind. Code § 34-4-16.5-4 (Burns 1986), and the Indiana Medical Malpractice Act, Ind. Code § 27-12-14-3 (Burns Supp. 1994) are set out fully in the Appendix, *infra*, 19a.

STATEMENT OF THE CASE

1. In a case involving only State issues of traditional negligence law, the Seventh Circuit Court of Appeals has eliminated the right of Indiana governmental defendants to raise affirmative defenses, despite the existence of a State statute codifying the use of all common-law defenses in such cases. In reaching this result, the Seventh Circuit has ignored all precedent from the courts of the State of Indiana. This is the only case which holds that an Indiana governmental defendant may not raise an affirmative defense when charged with negligence. (App., *infra*, 12a).

Steven Myers ("Steven"), who was sixteen years and nine months old at the time, attempted suicide on the twenty-eighth day of his detention at Lake County Juvenile Center ("Center"). At trial as well as on appeal, County of Lake ("Lake County") argued that it had established, as a matter of law, affirmative defenses involving Steven's contribution to his own injuries. Under Indiana law, any of these defenses bars Steven from recovering from even a negligent

defendant. They also bar the claim of Steven's father, Robert Myers ("Robert"), for loss of services and medical bills, since, under Indiana law, his claim is derivative of his son's. On appeal, Steven conceded that the affirmative defenses were "properly submitted" to the jury. (Brief of Appellees at 20 and 24). The Seventh Circuit eliminated affirmative defenses available under State law without reference to a single case or principle of Indiana law.

2. The Seventh Circuit has refused to enforce an Indiana statute which limits or caps plaintiffs' combined recovery to $300,000. (App., *infra*, 12a-13a). There are no cases directly interpreting the statute in this narrow context. Lake County cited the Seventh Circuit to Indiana cases interpreting another, similar Indiana cap statute and other case-law showing that the claims in this case were subject to a single cap since one claim is derivative of the other. Rather than examining these cases, however, the Seventh Circuit rewrote the analogous statute, claiming that it contained an express provision subjecting derivative claims to the same cap as that of the underlying claim. In fact, the express provision to which the Seventh Circuit referred does not exist in the statute.

3. Finally, the Seventh Circuit, in affirming the district court, so distorted the record on appeal as to make it unrecognizable. In addition to misstating and ignoring Indiana law, it ignored and created facts, and drew inferences which were diametrically opposed to the jury's verdict and the district court's judgment. The opinion of the Seventh Circuit is truly remarkable for its utter failure to ground itself in any principle of law or fact.

4. Steven and his father, Robert, brought two claims against, among others, Lake County, and two employees of the Center, Robert Bennett, the superintendent, and James Desler, the therapist. Plaintiffs alleged violations of consti-

tutional rights under 42 U.S.C.A. § 1983. They also claimed that these defendants were negligent as to Steven under Indiana law. (App., *infra*, 2a). The district court granted summary judgment to all defendants on the claims arising under 42 U.S.C.A. § 1983. The case went to trial solely on the issue of the claim of negligence under State law. (App., *infra*, 5a). Because no federal issue survived summary judgment, the district court exercised supplemental jurisdiction over the pendent state claim pursuant to 28 U.S.C.A. § 1367(a).

The jury returned a verdict in favor of the individual defendants, Robert Bennett and James Desler. (App., *infra*, 14a). It returned a verdict of $500,000 in favor of Steven, and $400,000 in favor of Robert against Lake County only. Purporting to apply the Indiana Tort Claims Act, the district court reduced these verdicts to $300,000 each. (App., *infra*, 17a). Further facts will be adduced as appropriate.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's holding eliminating the right of governmental defendants to raise affirmative defenses is contrary to an Indiana State statute codifying the right of such defendants to raise these defenses. The Seventh Circuit's Opinion is unique, and stands against every Indiana Supreme Court and Court of Appeals' decision. It has also ignored Indiana statutes and case-law which limits Lake County's liability in this case. Instead of applying existing Indiana law, the Seventh Circuit has substituted its judgment for what it believes the law of this State should be, in direct contravention of *Erie v. Tompkins* and other precedents of this Court.

The failure of the Seventh Circuit to follow Indiana law is exacerbated by its egregious distortion and manipulation of the facts of this case. The Seventh Circuit conjured legal principles contrary to existing Indiana law, and applied these principles to facts it had created. This Opinion clearly demonstrates a departure from the "accepted and usual course of judicial proceedings." Supreme Court Rule 10.1(a).

For the foregoing reasons, this court should grant the instant Petition.

I.

THE COURT OF APPEALS HAS ACTED UNCONSTITUTIONALLY BY IGNORING EXISTING INDIANA LAW AND ELIMINATING INDIANA STATUTORY AND COMMON-LAW DEFENSES AND LIMITS OF LIABILITY IN A CASE INVOLVING EXCLUSIVELY QUESTIONS OF INDIANA STATE LAW.

This Court announced long ago that federal courts, when deciding issues of state law, are bound by the legislative enactments and by decisions of the highest court of that state. *Erie R. Company v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). The *Erie* doctrine restrains federal judges from advancing doctrines which they think at the time "should be the general law on a particular subject." *Id.* Federal judges may not look to their own predilections, but, rather, must strictly apply the law of the state.

This Court has further restrained federal courts deciding state law issues, holding that they are bound even by *intermediate* state court resolutions of such issues. *Hicks v. Feiock*, 485 U.S. 624, 629, 108 S.Ct. 1423, 1428, 99 L.Ed.2d 721 (1988). Such a court's determination of issues of state law "is a datum" for determining what state law is, but that this datum may not be disregarded by a federal court

unless there exists other "persuasive data" that the highest court of the state would decide the issue differently. Where the state's highest court has refused to review the intermediate court's decision, that decision has even greater weight. *Hicks*, 485 U.S. at 624, 108 S.Ct. at 1428, n.3, citing *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237-38, 61 S.Ct. 179, 183-84, 85 L.Ed. 139 (1940).

Though ignored in this case, these principles have been followed within the Seventh Circuit in its prior decisions. *See Barger v. State of Indiana*, 991 F.2d 394 (7th Cir. 1993); *Peeler v. Village of Kingston Minds*, 862 F.2d 135, 137 (7th Cir. 1988); *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *McCoy v. Richards*, 711 F.2d 1108, 1110 (7th Cir. 1985).

A. THE COURT OF APPEALS HAS UNCONSTITUTIONALLY ELIMINATED DEFENSES MADE AVAILABLE UNDER THE STATUTES AND COMMON-LAW OF THE STATE OF INDIANA IN A CASE IN WHICH THE ONLY ISSUES RAISED INVOLVED QUESTIONS OF INDIANA STATE LAW.

Contrary to established Indiana law, the Seventh Circuit eliminated affirmative defenses involving the plaintiff's conduct in a lawsuit alleging negligence against a governmental entity. Purporting to apply Indiana law, the Seventh Circuit held, *as a matter of law*, that the defenses of contributory negligence, incurred risk, Steven's reckless disregard for his own safety, and Steven's intentional conduct were no longer available to Lake County. Rather than enforcing an Indiana statute and decisional precedent, the Seventh Circuit impermissibly substituted its own judgment of what it believed Indiana law should be in reviewing a case over which the district court exercised only supplemental jurisdiction, and which presented no federal issue. A statute of the State of Indiana affords the aforementioned

defenses as a complete bar to liability as to any governmental entity sued in negligence. Ind. Code § 34-4-33-8 (Burns, 1986). Cases decided by the Indiana Supreme Court and Court of Appeals unanimously show, without exception, that this statute allows governmental entities the right to raise these defenses in negligence cases. E.g., *Beckett v. Clinton Prairie School Corporation*, 504 N.E.2d 552, 554 (Ind. 1987); *Roddel v. Town of Flora*, 580 N.E.2d 255, 259 (Ind. App. 1991); *Mauller v. City of Columbus*, 552 N.E.2d 500 (Ind. App. 1990) *transfer denied*; *City of Alexander v. Allen*, 552 N.E.2d 488 (Ind. App. 1990) *rehearing denied*; *City of Bloomington v. Kuruzovich*, 517 N.E.2d 408 (Ind. App. 1987); *Sellersburg Volunteer Fire Dept., Inc. v. Edwards*, 463 N.E.2d 508 (Ind. App. 1984).

Despite these well-established principles of Indiana law, the Seventh Circuit disregarded Ind. Code § 34-4-33-8, and unanimous Indiana case-law. The Opinion failed to cite to a single Indiana case, in any context, where a governmental defendant in a negligence case was not allowed to raise affirmative defenses. The Seventh Circuit departed from established Indiana law, holding that the Indiana Supreme Court would not allow the defendant to raise the plaintiff's conduct as an affirmative defense, where the defendant is charged with negligence in supervising or in failing to prevent the act complained of. (App., *infra*, 11a). The Seventh Circuit is mistaken.

In *Beckett v. Clinton Prairie School Corporation*, a case cited, though not discussed by the Seventh Circuit, a student athlete was injured in a school-sponsored baseball practice when he collided with another student on the field. The student sued the school, a governmental entity, alleging, *inter alia*, that the school system negligently failed to supervise the practice to prevent injury; that it failed to post sufficient personnel to watch for possible collisions;

and that the practice was conducted in an unreasonably dangerous manner. *Beckett*, 504 N.E.2d at 553. The Indiana Supreme Court, *in a unanimous 1987 decision*, held that the affirmative defense of incurred risk had been established *as a matter of law*, since Beckett testified that he was aware of the dangers to which he exposed himself prior to undertaking the practice. *Id.* at 555-56.

Steven testified that he intended to commit suicide on the day in question; that he did not wish to be prevented from doing so; that he deliberately did not indicate his intent to any of the staff at the Center, because he knew that if he did so members of the staff would attempt to prevent him. (App., *infra,* 20a). The uncontradicted testimony from Defendant's expert was that Steven's act was rational, deliberate, and thoughtful. (R.IV.769-772).

The application of *Beckett* to the case at bar is self-evident. Plaintiffs allege that Lake County negligently failed to supervise Steven to prevent his attempted suicide; failed to have sufficient personnel at the Center to prevent Steven's attempt; and that it operated the Center in an unreasonably dangerous manner. These allegations are identical to the allegations raised in *Beckett*. There is every reason to conclude that the Indiana Supreme Court would allow Lake County to raise the defense of incurred risk or any other appropriate affirmative defense. Applying the principles of *Beckett*, it is obvious that the defense of incurred risk operates as *a matter of law* to bar Steven's claim.

Ironically, the author of the Seventh Circuit Opinion herein has, in a prior case, both recognized and applied the foregoing principles of *Beckett*. In *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), a prisoner, was subjected to a homosexual rape by other prisoners. He sued various prison officials and guards for their alleged negligence. Citing

Beckett, the Seventh Circuit held that defendants established the defense of incurred risk *as a matter of law*. *McGill*, immediately prior to the rape, had been subjected to verbal taunts threatening such rape, but he did not retreat. Instead, he proceeded into the shower area where the rape occurred. The court found that this failure to retreat established the defense as a matter of law. *McGill*, 944 F.2d 352-53. The Seventh Circuit held, under Indiana law, that the defendants were "*entitled to assume that the prisoners will exercise care for their own safety.*" *Id.* at 353 (emphasis added). The Court went on to state that it was "persuaded" that the courts of Indiana would not require defendants to compensate McGill for injuries where he had incurred the risk. *Id.*

It is remarkably inconsistent that, three years after deciding *McGill*, with absolutely no change having occurred in Indiana law, the Seventh Circuit has eliminated the very presumptions of Indiana law it recognized in *McGill*: Detainees must exercise reasonable care for their own safety. By removing all affirmative defenses, the Seventh Circuit has made all custodial institutions insurers of the safety of their charges, a proposition which has been rejected by every Indiana court which has reached the issue. *Cole v. Indiana Department of Correction*, 616 N.E.2d 44, 45 (Ind.App. 1993) *rehearing denied, transfer denied*; *Breese v. State*, 449 N.E.2d 1098, 1104 (Ind.App. 1983); *Fowler v. Norways Sanatorium*, 112 Ind.App. 347, 42 N.E.2d 415, 418 (1942).

Do not *Erie v. Tompkins* and its progeny require federal courts to ground their determinations of State law questions in existing State law? In the Seventh Circuit the answer to this question is, "No." The Seventh Circuit should have applied Indiana law as it currently exists, applying the closest analogues in Indiana law to the facts of this

case. It should have allowed either the Legislature or the courts of this State to determine whether it is appropriate to establish exceptions to an absolute rule of law which currently exists in this State. Its failure to leave issues of State law to the State of Indiana mandates the exercise of this Court's discretion in granting certiorari.

B. THE COURT OF APPEALS HAS ACTED UNCONSTITUTIONALLY IN REFUSING TO ENFORCE AN INDIANA STATUTE LIMITING THE LIABILITY OF THE DEFENDANT WHERE THE ONLY ISSUE RAISED IN THIS CASE INVOLVED QUESTIONS OF INDIANA STATE LAW.

The district court entered judgment in favor of both plaintiffs, awarding each $300,000. Lake County argued below that the district court erred in so doing since a provision of the Indiana Tort Claims Act, Ind. Code § 34-4-16.5-4 (Burns 1986), limits the liability of governmental defendants to $300,000 "for injury to or death of one (1) person in any one (1) occurrence". Lake County argued that, since Robert's claim was derivative of Steven's, it was subject to the same "per person" cap as Steven. In affirming the district court, the Seventh Circuit ignored or misread each case cited by Lake County; re-wrote a similar statute so that the re-written statute would appear to support the Seventh Circuit's Opinion; and re-wrote the holdings of Indiana cases, stating that those cases stood for propositions for which they patently do not stand.

Since there are no cases interpreting the cap provision of the Tort Claims Act in this narrow context, Lake County cited the Seventh Circuit to another Indiana statute which contained a similar cap provision. The Indiana Medical Malpractice Act limits the damages recoverable from a negligent defendant "for an injury or death." Ind. Code § 27-12-14-3 (Burns Supp. 1994). Indiana courts have inter-

preted this cap provision as allowing the recovery of only one cap even where a derivative claim for the spouse's personal loss was made. *St. Anthony Medical Center, Inc. v. Smith*, 592 N.E.2d 732, 739 (Ind.App. 1992) *transfer denied*; *see also*, *Bova v. Roig*, 604 N.E.2d 1 (Ind.App. 1992). Lake County argued that since the Tort Claims Act used language similar to that of the Malpractice Act, Indiana courts are likely to interpret the two statutes in the same way. Thus, Robert's claim, which is derivative of Steven's cause of action, would be subject to the same single cap as Steven's claim.

The Seventh Circuit failed to address Lake County's argument. Instead, it asserted that Indiana courts would distinguish the two cap provisions because the malpractice statute contained an express provision subjecting derivative claims to the single cap, while the Tort Claims Act "lacks a comparable provision." (App., *infra*, 13a). *This statement is not true*. There is no such express provision in the malpractice statute. Indiana courts have interpreted the statute to impose such a limitation. Indiana courts would interpret the Tort Claims Act cap in the same way, since the two statutes are so similarly worded. There is no basis in Indiana law for a federal court to suggest otherwise.

The Opinion chided Lake County for not citing *Andis v. Hawkins*, 489 N.E.2d 78 (Ind.App. 1986) *rehearing denied, transfer denied* and *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind.App. 1982). The Seventh Circuit stated that *Andis* and *Buffalo* held that the statutory maximum in an action for the wrongful death of a minor "applies separately to a deceased child and a surviving parent." It stated that the district court "drew an analogy" to these cases, deciding that multiple caps were recoverable in this case. The Seventh Circuit endorsed this "analogy." (App., *infra*, 13a).

Andis v. Hawkins and *Buffalo v. Buffalo* do not stand for the propositions for which they were cited by the Seventh Circuit. *Andis* held that a parent's action for loss of consortium of a child was a separate and distinct action independent of the Wrongful Death Statute. *Andis*, 489 N.E.2d at 82. *Buffalo v. Buffalo* was not a death case, did not involve the Wrongful Death of a Minor Statute, and it is utterly uninformative as to whether or not more than one cap is available under that statute. Neither case addressed the issue of whether multiple caps were available under the death statute.

Nowhere in the order of the district court did that court draw the analogy that the Seventh Circuit claimed it did. The sole proposition for which the district court cited these cases was that they established that the claims of a parent and child were separate and distinct, (App., *infra*, 16a-17a), a matter not disputed in the district court or in the court of appeals by Lake County.

The Seventh Circuit dismissed Lake County's other citations to authority on this issue as "transparently irrelevant," since it stated that those cases involved "multiple injuries to a single person." (App., *infra*, 13a). *This statement by the Seventh Circuit is utterly false.* Lake County did not cite a single case to the Seventh Circuit which involved "multiple injuries to a single person."

First, Lake County cited *Montgomery v. Farmer's Ins. Group*, 585 F.Supp. 618 (S.D.Ind. 1984) (applying Indiana law). In this case, which involved the interpretation of an insurance policy cap provision, the court held that, where a husband received bodily injury, a wife's loss of consortium claim was subject to the same "per-person" limitation applicable to the husband's claim, rather than the "per-occurrence" limitation contained in the policy. The court reached this conclusion because the wife's claim was derivative of

the husband's. *Id.* at 619. Lake County argued that this case lent support to the argument that the "per-person" limitation capped Robert's derivative claim. Petitioner is perplexed as to why this case should be so "transparently irrelevant."

Second, Lake County cited the Seventh Circuit to *Indiana State Highway Commission v. Morris*, 528 N.E.2d 468 (Ind. 1988) and *Gibson v. Gary Housing Authority*, 754 F.2d 205 (7th Cir. 1985) (applying Indiana law). These cases allowed recovery of multiple caps under the Tort Claims Act where each plaintiff received personal injury, as in where a driver and passengers of an automobile each received bodily injury in an accident. The courts have held that each plaintiff could recover his own cap. Lake County argued that this was the only circumstance in which multiple cap recoveries are available.

Third, Lake County cited three cases from foreign jurisdictions with tort claims acts similar to those of Indiana. Those cases held that the single "per person" limitation applied despite the number of individuals who might state a claim (e.g. for loss of consortium) where only one individual suffered personal injury or death. *Barringer v. State of Idaho*, 727 P.2d 1222 (Idaho 1986); *Madisonville Independence School District v. Kyle*, 658 S.W.2d 149 (Tex. 1983); *City of Austin v. Cooksy*, 570 S.W.2d 386 (Tex. 1978). Lake County is at a loss to understand how these cases are "transparently irrelevant."

Under the principles of *Erie v. Tompkins*, the Seventh Circuit was bound to follow Indiana statutes and case-law, not to re-write them. There can be no clearer example of a panel of federal judges substituting its own judgment for what is in fact the law in the State of Indiana. Such blatant disregard for the law should not be tolerated by this Court. Certiorari is appropriate.

II.

THE COURT OF APPEALS' GROSS ERRORS IN DISTORTING AND MANIPULATING THE LAW AND FACTS OF THIS CASE, UPON WHICH ERRORS IT THEN BASED ITS OPINION, CONSTITUTE SUCH AN EGREGIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER (SUPREME COURT RULE 10.1(a)).

In its Opinion, the Seventh Circuit created facts not in evidence, ignored uncontradicted testimony, drew inferences diametrically opposed to the jury's verdict, re-wrote state statutes, and misstated the facts and holdings of prior Indiana precedent. The errors so committed by the Seventh Circuit do not touch on merely tangential matters; rather, the Seventh Circuit has misstated or concocted facts and law which go to the very heart of the issues on appeal. The errors are so egregious and so numerous as clearly to show a departure from the "accepted and usual course of judicial proceedings" which one expects from a United States Circuit Court of Appeals. Supreme Court Rule 10.1(a). *New York City Transit Authority v. Beazer,* 440 U.S. 568, 570-71, 99 S.Ct. 1355, 1358, 59 L.Ed.2d 587 (1979). The gravity of these errors compels the exercise of supervisory power by this Court.

The errors of law committed by the Seventh Circuit have been discussed in detail above (sections I.A. and B., *supra*), and will not be reiterated here. Standing alone they are sufficient to constitute a departure from the "accepted and usual course of judicial proceedings." Beyond these errors, however, the Seventh Circuit misstated virtually every important fact relevant to the appeal. Those errors are digested below.

1. Steven's "mental condition was not tested" from the time of his admittance to the Center until his attempted

suicide. (App., *infra*, 8a). *There is absolutely no evidence in this case to support this assertion.* The uncontradicted testimony at trial was that Steven was evaluated by James Desler on December 7, 1988, the date of his admittance, and found not to be a suicide risk. (R.III.646; 647). Plaintiffs' own Exhibit 6 confirmed Desler's testimony. (R.III. 655; 659). Desler, who was a defendant in this case, testified that conducting such an examination at the time of each resident's admittance was a part of his duties. (R. III.657). Since the jury found in Desler's favor, it *must* have found that he did conduct such a mental status examination.

2. No member of the Center staff "trained in such matters [detecting suicidal ideations]" saw Steven when he arrived at the Center. (App., *infra*, 8a). *This statement is utterly untrue.* Desler had a Master's degree in clinical psychology and had been the therapist at the Center for some ten years. (R.III.655). The only expert psychologist who testified in this case, Dr. Paul Macellari, testified that Desler, given his credentials, was eminently qualified to undertake this evaluation. (R.IV.808-809). This testimony was uncontradicted.

3. The jury "could [have] believe[d]" that Steven was not seen by the therapist. (App., *infra*, 8a). *This statement is directly contrary to the jury's verdict and the district court's judgment.* It is also inconsistent with the Seventh Circuit's statements in points 1 and 2, *supra*, where the court flatly asserted Steven was not seen by the therapist. Desler testified that it was a part of his duties to see each resident. It is self-evident that the jury must have concluded that he did conduct this examination and that he was not negligent in finding Steven was not a suicide risk. Had it believed otherwise, it would have found against him.

4. Lake County "does not contend that psychological screening would have classified Steven as a low-suicide risk." (App., *infra*, 9a). To the contrary, Lake County did contend, without contradiction, that a mental status examination on the date of his admission showed that Steven was not a suicide risk. Since the jury found for Desler, it must have believed that he was not negligent in his conclusion.

5. Lake County approached the scientific and psychological disputes involved in this case from "lay perspectives," without producing expert testimony regarding the issue of suicide detection. Since Lake County had not produced such expert testimony, it could not complain when the jurors' "intuitions differ from [its] own." (App., *infra*, 9a). *The Seventh Circuit has these "facts" precisely backwards.* The *only* expert psychologist who testified in this case was *Lake County's* expert, Dr. Paul Macellari, (R.IV.734), who testified on the precise issue of suicide detection (point 6, *infra*). It was the Plaintiffs who presented no expert testimony.

6. Ignoring the testimony of Lake County's expert, the Seventh Circuit cited various psychology books discussing the difficulties of detecting suicidal individuals and preventing attempted suicides. (App., *infra*, 6a). *The court failed to note that these issues, which it felt it had to go beyond the record to discuss, were all addressed by Lake County's expert, Dr. Macellari.* Dr. Macellari stated that an individual determined to commit suicide cannot be prevented from doing so, and that such an individual will always find a way of committing suicide. (R.IV.772). He endorsed the Center's policy of screening all residents at the time of their admittance. (R.IV.774).

7. The Center "was so starved for funds, so short handed, that its staff was unable to take steps appropriate to detect and curtail suicide risks." (App., *infra*, 7a). *There is absolutely no evidence to support this statement.* The

uncontradicted testimony of the Center's superintendent was that there was always a sufficient number of people employed at the Center to run it safely. (R.III.488). Further, all Center employees testified that it was a part of their daily duties to look for suicidal tendencies in their charges. (R.I.171-173; II.252-253). The uncontradicted evidence in this case was that, on the day in question, there had been at least two visual checks of Steven in his room fifteen minutes apart, with the last one occurring minutes before he attempted suicide. (R.I.154-156). There is neither evidence of starvation of funds nor of short-handedness.

8. The Center was so short handed that it did not "obtain and review the files inmates had accumulated at other institutions." (App., *infra*, 8a). The superintendent testified that, although employees of the center were not required to obtain records from other institutions, they had the authority to do so. (R.I.204-205). *Furthermore, there is no evidence in this case that the standard of care for facilities such as this required gathering records from other institutions.* Quite the opposite: Dr. Macellari testified that Steven's records at other institutions were irrelevant, because a determination of whether an individual is suicidal must be made at the time of the evaluation. He stated that an individual may be suicidal on one day, but not the next. (R. IV.773). This testimony was uncontradicted.

9. The Center staff was "so short handed" that it did not examine its own files. (App., *infra*, 8a). *This statement is false.* Desler testified that he had all of Steven's mental status evaluations from his prior admittances at the Center in front of him at the time that he did this last evaluation. (R.III.658). No evidence in this case contradicts this testimony.

The length to which the Seventh Circuit went to distort the facts of this case is matched only by its apparent

willingness to distort Indiana law. It is submitted that, had an attorney so misstated the facts and law of a case in a brief pending before the Seventh Circuit, such an attorney would be subject to criticism if for no other reason than for failing in his duty of candor towards the tribunal. It is respectfully submitted that the Seventh Circuit should be held to no lower a standard that the attorneys practicing before it. There is no clearer example of a departure from the accepted and usual course of judicial proceedings. Certiorari is appropriate.

CONCLUSION

Ignoring existing Indiana law, the Seventh Circuit eliminated the availability of affirmative defenses by stating that the duty to prevent the actor from doing a particular act cannot be defeated by the very action sought to be prevented. This statement tolls the death knell for affirmative defense. Every city and town in the ninety-two counties of the State of Indiana, as well as the State itself, operate schools, hospitals, police departments, juvenile centers, jails, or prisons. The rationale employed by the Seventh Circuit defeats the right of any of these governmental defendants to raise affirmative defenses, a right conferred by State statute. The Indiana Supreme Court held in *Beckett* that the school had a duty of reasonable care to prevent the harm; yet, it held that plaintiff had incurred the risk when he was involved in the collision. Hereafter, Indiana courts, faced with cases similar to *Beckett* would be bound to apply its rule of law. In the federal courts applyng Indiana law, the precise opposite is true—they must *ignore Beckett,* and apply *Myers.* Similar analogies can be drawn to cases such as *McGill v. Duckworth*, or even slip-and-fall cases in prisons, jails, hospitals, schools, or any government property.

The court not only eliminated affirmative defenses, but they eliminated a state statute limiting the exposure of such defendant. All governmental defendants in the State of Indiana now stand naked, devoid of the rights to raise defenses codified by the Legislature, and unable to rely on a statute limiting this exposure.

The instant Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT P. KENNEDY
Counsel of Record
FEISAL AMIN ISTRABADI
SPANGLER, JENNINGS
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

JOHN S. DULL
DULL AND DUGGAN
8300 Mississippi Street
Suite F
Merrillville, Indiana 46410
(219) 769-2875

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2469

ROBERT MYERS and STEVEN R. MYERS,

Plaintiffs-Appellees,

v.

COUNTY OF LAKE, INDIANA,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. H 91-001—**Andrew P. Rodovich,** *Magistrate Judge.*

ARGUED JANUARY 5, 1994—DECIDED JULY 22, 1994

Before EASTERBROOK and RIPPLE, *Circuit Judges*, and MIHM, *District Judge.**

EASTERBROOK, *Circuit Judge.* Steven Myers, age 16, was in the custody of Lake County, Indiana, during 1988 as a juvenile delinquent. While at an "open" facility he stole a staff member's car, leading to a transfer to more secure custody at the Lake County Juvenile Center (LCJC). Steven had been at the LCJC before, and his caseworker believed that he would be better off at a facility in Maine specializing in intelligent children who treated ordinary

---

* Hon. Michael M. Mihm, Chief Judge of the Central District of Illinois, sitting by designation.

detention facilities as challenges to be overcome. On December 27, 1988, a state court authorized Steven's transfer to Maine. Eight days later, while still at the LCJC, Steven hanged himself with a sheet. He survived but suffered severe and permanent brain damage. A jury concluded that the LCJC negligently failed to take precautions against suicide attempts, and Lake County appeals from an award of $600,000 in damages to Steven and his father Robert.

I

All parties to this case are citizens of Indiana. Plaintiffs invoked federal jurisdiction on the theory that the LCJC's deliberate indifference to suicide risks violated the due process clause of the fourteenth amendment, permitting recovery under 42 U.S.C. §1983 and supplying jurisdiction under 28 U.S.C. §1343(a)(3). Shortly before trial the magistrate judge, presiding by consent under 28 U.S.C. §636(c), granted summary judgment on the constitutional claim, ruling that plaintiffs had not produced evidence that the defendants acted with the mental state necessary to violate the Constitution. See *Tittle v. Jefferson County Commission*, 10 F.3d 1535 (11th Cir. 1994) (en banc) (minimum mental state is "deliberate indifference" to suicide risk); cf. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994); *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991). That decision left for trial only plaintiffs' negligence claim under Indiana law, which lacks an independent basis of federal jurisdiction. The magistrate judge exercised supplemental jurisdiction, see 28 U.S.C. §1367, on the theory that the constitutional claim had been resolved such a short time before trial that it would be more convenient to continue the federal proceeding than to resume the case in state court.

Whether it was prudent to try this case in federal court may be doubted. Before the enactment of §1367 in 1990, we took the position that the dismissal of the federal claim on the eve of trial is not by itself sufficient to justify resolving the remaining claims in federal court. *Olive Can Co. v. Martin*, 906 F.2d 1147, 1153 (7th Cir. 1990); *Manor*

Healthcare Corp. v. Guzzo, 894 F.2d 919, 922 (7th Cir. 1990). Section 1367(d), giving the plaintiff at least 30 days to re-file in state court after a federal court declines to exercise supplemental jurisdiction, removes the principal reason for retaining a case in federal court when the federal claim belatedly disappears. Our case presents several novel issues under Indiana law, and such contentions presumptively belong in state court—especially when a unit of state government is a defendant. How far state law exposes state and local agencies to liability is a delicate question that federal judges should hesitate to tackle. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). We held in *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993), that the enactment of §1367 did not change the standards guiding the exercise of discretion to hear pendent claims, which implies that the magistrate judge should not have tried this case. But see *Executive Software North America, Inc. v. United States District Court*, 1994 U.S. App. LEXIS 10787 (9th Cir. May 16, 1994) (disagreeing with *Brazinski*).

Neither side has questioned the exercise of supplemental jurisdiction, however. Whether or not it was a good idea to try the case in federal court in the first place, it is assuredly a bad idea to shuttle a case from one system of courts to another after trial, when no one asserts injury from the choice of forum. One trial per case is enough. A desire to curtail the cost of litigation is inadequate to support the judgment if the federal court lacks the *power* to decide. Litigants may not stipulate to federal jurisdiction, and federal judges must respect the limits on their adjudicatory power even if all litigants are content with the decision. The American Law Institute has questioned even this principle, calling dismissal of a case because of belated discovery of jurisdictional problems a "fetish of federal jurisdiction . . . wholly inconsistent with sound judicial administration [that] can only serve to diminish respect for a system that tolerates it." *Study of the Division of Jurisdiction Between State and Federal Courts* 366 (1969). The Supreme Court has not heeded the ALI's

call to alter the rule that federal courts must satisfy themselves of the existence of subject-matter jurisdiction, but it has suggested that federal courts are not obliged to extend this directive to its maximum possible extent. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989) (holding that courts may permit a change in the identity of parties to preserve jurisdiction, even though subject-matter jurisdiction was absent at the outset of the case).

To date, no court has considered the extent to which judges must resolve questions under §1367 without prompting from the parties. Section 1367 divides into stages the identification of pendent claims suitable for federal adjudication. Section 1367(a) spells out the limits of supplemental jurisdiction:

> [T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original [federal] jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Section 1367(b) limits this principle in certain cases under the diversity jurisdiction; these restrictions do not concern us here. Section 1367(c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Section 1367(c), identifying criteria that influence the prudent exercise of discretion to resolve claims under the sup-

plemental jurisdiction, supposes the raw *power* to resolve these claims. Adjudicatory power comes from the link between the claim creating federal jurisdiction and the pendent claims, which must be "so related to claims in the action within such original [federal] jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

This division between the requisites of judicial competence in §1367(a) and the criteria for the exercise of discretion in §1367(c) also marks, we believe, the division between matters the court must examine on its own and those that depend on an assertion of error by the litigants. A court must satisfy itself that a claim falls within the category laid out in §1367(a), for otherwise there is no federal jurisdiction. Once subject-matter jurisdiction is present, the district court "may decline to exercise supplemental jurisdiction," but a court's failure to act wisely in the exercise of this discretion does not justify forcing the litigants to start from scratch in state court. An imprudent exercise of supplemental jurisdiction injures litigants in other federal cases, for they must wait in a longer queue. Nothing the court of appeals can do after the case has already been tried can redress this injury. Vacating the judgment would add to these litigants' costs—and lengthen the queue in state court—without offering benefits to other litigants in federal court. Although the prospect of appellate dismissal *sua sponte* would make district courts more sensitive to their duties under §1367(c), the cost of the marginal improvement would be high and the benefits remote.

Plaintiffs' claim under §1983 fell within federal jurisdiction. They lost, not because of any defect in their legal theory, but because of a failure of proof. Their claims under Indiana law are "part of the same case or controversy"; there is only one nucleus of operative facts, one *claim* with different legal theories offered in support of recovery. Subject-matter jurisdiction under §1367(a) is secure. Because no one has contested the magistrate judge's decision to exercise supplemental jurisdiction, that is as far

as we need go. Accord, *Schneider v. TRW, Inc.*, 938 F.2d 986, 993 (9th Cir. 1991) (same conclusion under law preceding §1367).

II

Indiana requires institutions to use reasonable care to prevent their wards from committing suicide. *Fowler v. Norways Sanatorium*, 112 Ind. App. 347, 42 N.E.2d 415 (1942); *Breese v. State*, 449 N.E.2d 1098, 1104, 1117-18 (Ind. App. 1983); cf. *Tittle v. Mahan*, 582 N.E.2d 796, 801 (Ind. 1991). These opinions recognize that public employees fill the roles of parents and relatives, who may watch over their loved ones in times of stress—that, indeed, the state institutions may be the *source* of the stress pushing troubled youths toward the brink, something that may well have occurred here. (Steven Myers testified that he tried to commit suicide because he did not want to be sent to Maine, far away from his family.) See generally *Restatement (2d) of Torts* §314A(4) (1965). Indiana does not impose absolute liability on custodians for their charges' suicide attempts, however. Clever inmates can commit suicide no matter what the staff does to curtail their opportunities. Absolute liability would induce public bodies to meet even a slight risk with severe precautions. Because these precautions are unpleasant—inmates may be deprived not only of belts and ties but also of pens, sheets, blankets, even clothing, for almost any object may be used to harm oneself—a humane custodian seeks to confine their use to persons at substantial risk.

Predicting suicide is impossible. At best psychologists can group inmates according to risk. False positives are common; that is to say, most persons in these high-risk categories do not attempt to harm themselves. See David Lester & Bruce L. Danto, *Suicide Behind Bars: Prediction and Prevention* 23-36, 75-101 (1983); Madelyn S. Gould *et al.*, "The Clinical Prediction of Adolescent Suicide," in *Assessment and Prediction of Suicide* 130-43 (Ronald W. Maris *et al.*, eds., 1992); Ronald L. Bonner, "Isolation, Seclusion, and Psychosocial Vulnerability as Risk Factors

for Suicide Behind Bars," *id.* at 398-419. A duty to take maximum precautions would make life miserable for the many persons who are in categories of risk and could be consigned to months if not years without clothing (or even to spend time in restraints) despite an objectively low probability of harm. Thus the duty "is always that of reasonable care". *Breese*, 449 N.E.2d at 1104. Failure to prevent a given suicide attempt does not necessarily show the lack of care.

Lake County contends that nothing in the record shows that the staff of the LCJC knew that Steven was depressed or contemplating suicide. Consequently, it contends, "reasonable care" did not entail placing Steven on suicide watch and depriving him of sheets and other items that he could use to harm himself. One staff member of the LCJC after another testified that he did not notice anything out of the ordinary about Steven's behavior. If that testimony were all the record contained, we would agree with Lake County that reasonable jurors could not find negligence. (Although state law supplies the substantive standard of liability, federal law supplies the standard of review: whether reasonable persons could have found that the evidence meets the standard of substantive liability. *Mayer v. Gary Partners & Co.*, No. 93-3636 (7th Cir. July 13, 1994).) But that is not the limit of the evidence—indeed, defendant's assessment is not even responsive to the plaintiffs' theory. Plaintiffs do not now contend that any particular member of the LCJC's staff was negligent. Instead they argue that the LCJC was so starved for funds, so shorthanded, that its staff was unable to take steps appropriate to detect and curtail suicide risks.

In 1977 Lake County signed a consent decree promising to employ one full-time psychologist for every 44 inmates at the LCJC, with the proviso that the LCJC would always have at least one full-time psychologist even if the number of children fell below 44. But the County did not live up to its promise. In January 1989, when Steven Myers hanged himself, the only psychological services were provided by a part-time employee who stopped by on Tuesdays

and Thursdays. As a result, the LCJC did not routinely screen new inmates for suicide risk (or for any other purpose). Steven Myers did not see a psychologist, and his mental condition was not tested, between his arrival on December 7, 1988, and his attempted suicide on January 4, 1989, and this even though on December 27 a state court took a step (entering the transfer order) that greatly increased the stress to which he was subjected. So short-handed was the LCJC that it did not even examine the files of youths who had been there before. Had it done so, it would have discovered that during a previous stay at the LCJC Steven had been placed on suicide watch for depression and pronounced suicidal ideation. Caseworkers noted in the record that "[t]he child had been very depressed and has talked of suicide". This was denoted with an Ⓢ in his file—but the LCJC did not look at that file. (An employee of the LCJC testified that the Ⓢ was a clothing size, but the jury was not obliged to believe this.) Steven also had been on suicide watch at the Porter County Juvenile Detention Center, his location immediately preceding the transfer to the LCJC on December 7. The clinical director of a third facility where Steven had been held in 1988 testified that Steven's depression would have been "painfully obvious" when he arrived at the LCJC—but then, no one trained in such matters saw him when he arrived at the LCJC. (So the jury could believe. The psychologist testified that he did not recall seeing Steven on his admission in December 1988.) Records of other institutions that Steven had visited also contain notations that Steven was depressed and had talked of suicide. Once again, the staff at the LCJC did not see these notations, because the LCJC was so short-handed that it did not obtain and review the files its inmates had accumulated at other institutions. Robert Myers testified that he told a member of the LCJC's staff about his son's suicidal thoughts, but that the LCJC did not respond. Institutional guidelines called for all of the LCJC's employees to have training in cardiopulmonary resuscitation; but the first employee to reach the scene had not been so trained, and

he had to fetch other employees while Steven lay in cardiac arrest.

Reasonable jurors could conclude that by starving the LCJC of funds Lake County prevented the exercise of reasonable care, even though none of the LCJC's employees was personally negligent. (This is apparently what the jury thought; although it found Lake County liable, it returned verdicts in favor of the two employees of the LCJC named as defendants.) Lake County does not contend that psychological screening would have classified Steven as low suicide risk, or that a proper understanding of the degree of that risk would have deemed it so small that precautions would inflict indignity without purpose. Instead of producing data about risk levels and the probability of proper classification, Lake County appealed to the intuitions of the jurors. Litigants who approach scientific and medical disputes from lay perspectives, as defendant did, cannot complain when jurors' intuitions differ from their own. It is possible, of course, that Steven would have attempted suicide even if he had received additional attention. He was intelligent and might have been able to fool the staff. A plaintiff need not exclude such possibilities in order to demonstrate negligence.

Lake County nonetheless contends that even if it was negligent plaintiffs cannot recover because Steven acted deliberately and was the cause of his own injury. Steven testified that he wanted to commit suicide and that he did his best to avoid detection. Defendant contends that Steven's acts may be classified as (a) an independent intervening cause, (b) contributory negligence, (c) reckless disregard of one's own safety, and (d) incurred risk. No matter which characterization is best, Lake County insists, it is entitled to prevail as a matter of law under Fed. R. Civ. P. 50, because any reasonable juror would have to conclude that one of these characterizations applies—and each, it believes, is a perfect defense under Indiana law. Yet the judge not only denied the motions for judgment as a matter of law during and after trial but also

gave the jury an instruction on only one of these four characterizations:

> By law, a person is not held responsible for acts and omissions that are due to a lack of capacity to appreciate and avoid danger. If you find that the plaintiff, Steven Myers, did not have the capacity to appreciate and avoid danger because of his age and emotional and mental condition, then he cannot be guilty of contributory negligence. However, if you find that Steven Myers had the capacity to appreciate and avoid the danger, then Steven acted intentionally and cannot recover even if you also find that the defendants were negligent.

Even that instruction was unduly favorable to the plaintiffs, Lake County submits. The judge should have told the jury that contributory negligence is a defense without regard to mental capacity. (The jury obviously concluded that Steven "did not have the capacity to appreciate and avoid danger because of his age and emotional and mental condition"; otherwise it would have returned a verdict for all defendants.)

Indiana recognizes intervening cause, reckless disregard of one's own safety, and incurred risk as defenses. E.g., *Beckett v. Clinton Prairie School Corp.*, 504 N.E.2d 552 (Ind. 1987); *Foster v. Purdue University Chapter of Beta Theta Phi*, 567 N.E.2d 865 (Ind. App. 1991); *Szabo v. Cwidak*, 558 N.E.2d 855, 857 (Ind. App. 1990). Even contributory negligence, long since replaced by comparative negligence in private litigation, still applies if the defendant is a public agency. Ind. Code §34-4-33-8; *Roddel v. Town of Flora*, 580 N.E.2d 255, 259 (Ind. App. 1991). But Indiana has never used any of these defenses in suicide cases, and it is hard to see how it could. If the custodian has a duty to protect the inmate from himself, the fact that the inmate tried to harm himself is a reason for liability rather than a defense. But then, as Justice Holmes wrote, "[t]he life of the law has not been logic: it has been experience." *The Common Law* 1 (1881). States are free to recognize

defenses that do not mesh perfectly with the rationale behind the corresponding claims for relief.

Our task is to predict how Indiana would answer a question it has never considered. Would it recognize intentional efforts to commit suicide as defenses to the tort of negligently failing to prevent suicide attempts? (Everything comes down to this, regardless of the legal pigeonhole used.) Surprisingly few states have addressed the subject. Although a majority of the states require prisons and hospitals to take precautions against suicide, only seven have discussed whether deliberate self-injury eliminates a negligence claim against the custodian. Five have held squarely that it does not. *DeMontiney v. Desert Manor Convalescent Center*, 144 Ariz. 6, 695 P.2d 255 (1985); *Hickey v. Zezulka*, 439 Mich. 408, 487 N.W.2d 106 (1992); *Cole v. Multnomah County*, 39 Or. App. 211, 592 P.2d 221 (1979); *Kane v. State*, 1989 Tenn. App. LEXIS 759 (1989); *Alvarado v. Brownsville*, 865 S.W.2d 148 (Tex. App. 1993). One has held that it does. *Belen v. Harrell*, 93 N.M. 601, 603 P.2d 711 (1989). One more has assumed that it does, but concluded that because the person attempting suicide was drunk the facts did not establish the necessary volition. *Dezort v. Hinsdale*, 35 Ill. App. 3d 703, 342 N.E.2d 468 (2d Dist. 1976). We think it probable that Indiana would align itself with the majority—not only because the odds favor this, but also because the majority approach is consistent with the rationale of the tort. A duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided. "The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct". *Restatement (2d) of Torts* §314A comment *d*. Of course we cannot be *sure* that Indiana would reach this conclusion, but nothing in the three Indiana cases on this subject (*Fowler*, *Breese*, and *Tittle*) points the other way. Cf. *Brackett v. Peters*, 11 F.3d 78 (7th Cir. 1993) (discussing the analogous rule in criminal law that an aggressor is not freed from liability by the fact that he drives his victim to inflict additional injury on himself, or even to commit suicide).

This conclusion means that the jury instruction on contributory negligence was erroneous, but that the error favored defendants. Lake County's arguments about the evidence of Steven's intent to take his own life become irrelevant. The jury was entitled to decide for plaintiffs on the merits.

III

The jury awarded $500,000 to Steven Myers and $400,000 to his father Robert. The magistrate judge reduced these awards to $300,000 apiece, the per-person cap provided by Indiana law:

> The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment . . ., {may} not exceed three hundred thousand dollars [$300,000] for injury to or death of one [1] person in any one [1] occurrence and {may} not exceed five million dollars [$5,000,000] for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages.

Ind. Code §34-4-16.5-4 (material in brackets in original; material in braces added). Lake County believes that because Robert's injury is derivative from Steven's, the total award should be $300,000 rather than $600,000.

Robert's injury is derivative in the sense that he could not prevail if the jury decided against Steven, and in the further sense that his injury flows from Steven's loss. Robert's injury is independent in the sense that it covers different elements of loss: Robert recovers for Steven's medical expenses (for which Robert is fully responsible, including those to be incurred in the future by public facilities) plus the loss of the love, companionship, and services of his son; Steven recovers for loss of earning capacity plus pain and suffering. No one doubts that under Indiana law separate recoveries by parent and child are appropriate. Ind. Code §34-1-1-8. See *Andis v. Hawkins*, 489 N.E.2d

78, 82 (Ind. App. 1986); *Buffalo v. Buffalo*, 441 N.E.2d 711, 714 (Ind. App. 1982) (parent and child have "two causes of action").

Section 34-4-16.5-4 sets a limit of $300,000 "for injury to . . . one [1] person" in an occurrence. Robert and Steven are separate persons, suffering separate injuries. Does the fact that *liability* is derivative limit total recovery to $300,000 even though two persons suffer separate injuries? No Indiana court has addressed this question.

The magistrate judge drew an analogy to wrongful death actions, which in Indiana are subject to maximum recovery per person. In *Andis* and *Buffalo* the courts concluded that this maximum applies separately to a deceased child and a surviving parent. The magistrate judge believed that Indiana courts would take the same approach to the cap in Ind. Code §34-4-16.5-4. We, too, think this likely. When setting maximum recoveries in other statutes, Indiana has included some derivative losses within a single cap. For example, Ind. Code §27-12-14-3, which provides maximum recoveries in medical malpractice actions, includes damages for loss of consortium within the cap applicable to the injured spouse. See *St. Anthony Medical Center v. Smith*, 592 N.E.2d 732, 739 (Ind. App. 1992). Ind. Code §34-4-16.5-4 lacks a comparable provision, leading us to believe that Indiana courts would read its per-person limit the same way they have read the per-person limit in wrongful death actions. Lake County cites a number of cases holding that multiple injuries to a single person do not justify awards exceeding $300,000, but these cases are transparently irrelevant to the question whether father and son count as two "persons" for purposes of Ind. Code §34-4-16.5-4. Lake County does not cite, let alone attempt to distinguish, *Andis* and *Buffalo*. They are the closest parallels in state law, and we conclude that they support the judgment in this case.

AFFIRMED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ROBERT MYERS, on his own behalf and on behalf of his son Steven; and STEVEN R. MYERS, Plaintiffs,	)	
v.	)	CAUSE NO.: H-91-001
COUNTY OF LAKE; ROBERT BENNETT, individually and in his capacity as superintendent of the Lake County Juvenile Center and JAMES DESLER, individually and in his capacity as psychologist at the Lake County Juvenile Center, Defendants.	)	

COURT ORDER CORRECTING A CLERICAL MISTAKE IN ENTRY OF FINAL JUDGMENT

Upon the stipulated Motion of the parties to correct clerical error in the Court's judgment, the Court, being duly advised in the premises, now finds that the said stipulated Motion should be, and the same is hereby GRANTED.

IT IS, THEREFORE, ORDERED, ADJUDGED, ADJUDICATED, AND DECREED that the Clerk of this Court shall enter judgment in favour of the individual Defendants, Robert Bennett and James Desler.

SO ORDERED this 12 day of November, 1992, *nunc pro tunc* to the 3rd day of August 1992.

The Honourable Andrew P. Rodovich, JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ROBERT MYERS, on his own behalf and on behalf of his son Steven; and STEVEN R. MYERS, Plaintiffs,	)	
v.	)	CAUSE NO.: H-91-001
COUNTY OF LAKE; ROBERT BENNETT, individually and in his capacity as superintendent of the Lake County Juvenile Center and JAMES DESLER, individually and in his capacity as psychologist at the Lake County Juvenile Center, Defendants.	)	

ORDER

This matter is before the court on the Post-trial Memorandum Regarding Damages filed by the plaintiffs, Steven Myers and Robert Myers, on July 10, 1992, and by the defendant, the County of Lake, on July 13, 1992.

On June 12, 1992, a jury awarded $500,000 in damages to Steven Myers and $400,000 in damages to his father, Robert Myers. The parties subsequently were instructed to file briefs discussing the limitation of the Indiana Tort Claims Act on the verdict.

The Indiana Tort Claims Act states:

> The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment . . . does not exceed three hundred thousand dollars [$300,000] for injury or death

> to one [1] person in any one [1] occurrence and does not exceed five million dollars [$5,000,000] for injury to or death of all persons in that occurrence. . . .
>
> I.C. § 34-4-16.5-4 (Burns 1986)

The plaintiffs contend that since Robert Myers has a claim separate and distinct from Steven's claim, each award should be reduced to $300,000. However, the County contends that a verdict in favor of Robert depended solely on whether the jury returned a verdict in favor of Steven. Therefore, since Robert's claim is derivative of Steven's claim, the County argues that the total award should be reduced to $300,000.

The parties agree that neither the Indiana Supreme Court nor the Indiana Court of Appeals has interpreted I.C. 34-4-16.5-4 in a case involving an injury to a minor child. When a federal court is confronted with a novel question of state law, the federal court must attempt to predict how the highest state court would resolve the issue. *See generally Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1218, 113 L.Ed.2d 190 (1991); *Ross v. Creighton University*, 957 F.2d 410, 413 (7th Cir. 1992); and *Transamerica Insurance Company v. Henry*, 934 F.2d 133, 134 (7th Cir. 1991).

The County contends that Robert Myers did not have an injury apart from Steven's injury. However, under Indiana law, a parent can bring a separate action for his injuries as a result of a minor child's wrongful injury or death. *See* I.C. § 34-1-1-8. In *Andis v. Hawkins*, 489 N.E.2d 78 (Ind. App. 1986), the court determined that the parents' action is "separate and distinct" from the claim of the minor child. The Court of Appeals stated:

> Under the predecessor statute to Ind. Code sec. 34-1-1-8, (Burns Anno. Stat. sec. 2-217) it was held that "[t]his

> statute gives rise to a new and independent action for the destruction of a property right . . ." (citation omitted) Thus, in *Hahn*, the Indiana Appellate Court held that the then existing $10,000 limit on the damages recoverable under the wrongful death statute did not apply to the parent's action for death of his child, and a damage award of $20,000 in such case was upheld.
>
> 489 N.E.2d at 82

In *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. App. 1982), the court stated:

> A wrongful act resulting in injury to a minor child gives rise to two causes of action, one in favor of the injured child for personal injuries inflicted and the other in favor of the parent for loss of services. (citation omitted) By statute, the custodial parent is entitled to maintain an action for injury to a child.
>
> 441 N.E.2d at 714

The County correctly states that if Steven were an adult, Robert Myers would not be allowed to recover any damages. However, parents are entitled to bring an action on their own behalf for injuries to their minor child under I.C. § 34-1-1-8. In addition, if Steven were an adult, Robert Myers also would not be responsible for Steven's medical bills. Under I.C. § 31-6-4-18, a parent is financially responsible for any services ordered by the juvenile court for the minor child. Since Steven Myers was a minor at the time of his injuries, Robert Myers has a separate and distinct cause of action. Therefore, each plaintiff may recover up to the statutory limit of $300,000.

For the reasons set forth above, the Clerk is ORDERED to enter judgment on the jury verdict returned on June 12, 1992 in the amount of $300,000 in favor of the plaintiff,

Steven Myers, and the amount of $300,000 in favor of the plaintiff, Robert Myers.

ENTERED this 1 day of August, 1992.

_____

Andrew P. Rodovich
United States Magistrate Judge

STATUTORY PROVISIONS INVOLVED

34-4-16.5-4 states in pertinent part:

> This chapter [the Comparative Fault Act] does not apply in any manner to tort claims against governmental entities or public employees under IC 34-4-16.5 [the Tort Claims Act].

34-4-16.5-4 states in pertinent part:

> The combined aggregate liability of all governmental entities . . . does not exceed three hundred thousand dollars [$300,000] for injury to or death of one [1] person in any one [1] occurrence and does not exceed five million dollars [$5,000,000] for injury to or death of all persons in that occurrence.

27-12-14-3 states in pertinent part:

> (a) The total amount recoverable for an injury or death of a patient may not exceed five hundred thousand dollars ($500,000) except that, as to an act of malpractice that occurs on or after January 1, 1990, the total amount recovered for an injury or death may not exceed seven hundred fifty thousand dollars ($750,000). . . .

EXCERPT OF STEVEN MYERS' TESTIMONY

Q: "Is there any reason that you wouldn't have told a staff member at the time what you told Jesus [another resident, whom Steven claims to have told of his intention to commit suicide]?" And you answered, "Yeah." And I asked you, "What would that be?" And you answered, "I didn't want to go back to paper sheets. I wanted to stay warm." And I asked you, "So you knew that if the staff knew, that they'd take some action to try to prevent you from doing this?" And you answered, "Yes." And I then asked you, "And exact—and that's exactly what you didn't want at that time?" And you answered, "Yes." Do you remember that exchange, Steven?

A: Not exactly, but—yes.

Q: You remember that happened, didn't it?

A: Yes.

Q: And you told me then, that you didn't want people at the Lake County Juvenile Center to put you on suicide watch?

A: Yes.

Q: And that's right, isn't it Steven?

A: Yes.

Q: You didn't want them to stop you; isn't that right Steven?

A: Yes.

(R.III. 531-532).

(2)

SUPREME COURT, U.S.
NOV 18 1994
OFFICE OF THE CLERK

No. 94-731

In The

Supreme Court of the United States

October Term, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TERRY E. JOHNSTON
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1855

IVAN E. BODENSTEINER
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1162
Counsel of Record

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTION PRESENTED

Whether the Court of Appeals properly interpreted and applied Indiana law to a pendent state tort claim arising out of an attempted suicide by the respondent Steven Myers while incarcerated in the Lake County Juvenile Center (LCJC), thereby precluding review on writ of certiorari under Rule 10 of the Rules of this Court?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

A. Consistent with the method established by this Court, the Court of Appeals properly predicted that Indiana would not recognize intentional efforts to commit suicide as defenses to the tort of negligently failing to prevent suicide attempts 11

B. Consistent with the method established by this Court, the Court of Appeals properly predicted that Indiana would allow a parent and child, who suffer separate injuries, to each recover up to $300,000 under its Tort Claims Act 14

CONCLUSION 17

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Andis v. Hawkins, 489 N.E.2d 78 (Ind. App. 1986) 15, 17

Automotive Underwriters, Inc. v. Camp, 32 N.E.2d 112 (Ind. App. 1941) 15

Breese v. State, 449 N.E.2d 1098 (Ind. App. 1983) 12

Buffalo v. Buffalo, 441 N.E.2d 711 (Ind. App. 1982) 15, 17

Cole v. Indiana Dept. of Correction, 616 N.E.2d 44 (Ind. App. 1993) 11

Collection Bureau of Warrick County, Inc. v. Sweeney, 434 N.E.2d 143 (Ind. App. 1982) 16

Fowler v. Norways Sanatorium, 42 N.E.2d 415 (Ind. App. 1942) 12

Memorial Hospital of South Bend, Inc. v. Scott, 300 N.E.2d 50 (Ind. 1973) 13

Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7 (1943) 11

Nelson v. Heyne, 355 F.Supp. 451 (N.D. Ind. 1972), *aff'd.* 491 F.2d 352 (7th Cir. 1974), *cert. den.* 417 U.S. 976 (1977) 12

Reed v. State, 479 N.E.2d 1248 (Ind. 1985) 11

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217 (1991) 11

Scott County School District One v. Asher, 324 N.E.2d 496 (Ind. App. 1975) 16

TABLE OF AUTHORITIES – Continued

Page

Stropes v. Heritage House Childrens Ctr., 547 N.E.2d 244 (Ind. 1989) 12

Tittle v. Mahan, 582 N.E.2d 796 (Ind. 1992) 12

STATUTES

I.C. § 31-6-1-1(3) 1, 12

I.C. § 31-6-4-18 ..... 1, 16

I.C. § 31-6-9-5 ..... 1, 12

I.C. § 34-1-1-8 ..... 1, 15

I.C. § 34-4-16.5-4 ..... 2, 14, 16

MISCELLANEOUS

210 I.A.C. §§ 4-1-2 & 4-1-4 ..... 2, 13, 14

Restatement, Second, Torts, § 314A 12, 13

Restatement, Second, Torts § 703 15

Liability of Jail for Self-Inflicted Injury, 79 ALR3d 1210, 1216-17 (1977) 13

Suicide of Mental Patient, 19 ALR4th 7, 15-21 (1983) 13

No. 94-731

In The

Supreme Court of the United States

October Term, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1994 and the jurisdiction of this Court is based on 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343 and 1367.

STATUTORY PROVISIONS

The relevant statutory provisions include Ind. Code §§ 31-6-1-1(3), 31-6-4-18, 31-6-9-5, 34-1-1-8 and

34-4-16.5-4; relevant regulations are 210 I.A.C. §§ 4-1-2 and 4-1-4. *See Appendix at A-1 - A-4.*

STATEMENT OF THE CASE

Steven Myers, at the age of sixteen (16), was confined involuntarily in the LCJC on January 4, 1989 when he tied a bed sheet around his neck and hung from a door hinge in an attempted suicide. This attempt went unnoticed by detention officers, and the defective monitoring system, until it was brought to their attention by a resident in a room across the hall from Steven. He was discovered in time to save his life, however, he suffered extensive and permanent brain damage. Steven, his father (Robert) and stepmother (Terri) brought this action for damages alleging negligence under state law and a violation of the fourteenth amendment to the U.S. Constitution. After summary judgment was granted in favor of the defendants on the federal claim shortly before trial, the pendent state negligence claim was tried and the jury returned its verdict, *R. # 82,* in favor of the plaintiffs, Robert and Steven Myers, and against the County of Lake, awarding Steven $500,000 and Robert $400,000. Subsequently, after receiving memoranda on the application of the $300,000 statutory limit on damages against state and local government in Indiana, on August 3, 1992 the court ordered, *R. # 98, Petition App. at 15a-18a,* that each plaintiff was entitled to $300,000 and a judgment in the amount of $600,000 was entered on the same date. *R. # 99.*

The LCJC is a secure detention facility, housing juveniles who are there involuntarily. *Tr. 185.* It was designed for eighty-four (84) residents and was at capacity on January 4, 1989. *Tr. 186-87.* Defendant Bennett was superintendent of the LCJC during all times relevant to this case, *Tr. 178-91,* but was not familiar with Indiana Department of Corrections (DOC) regulations dealing with juvenile detention facilities. *Tr. 186.* Residents of the LCJC were classified by age, size and sex, but not by general behavioral characteristics, *Tr. 187,* as required by DOC regulations. *Ex. 52.* The purpose of the juvenile justice system in Indiana is to rehabilitate and treat children brought into the system as persons in need of care, treatment, rehabilitation or protection. *Tr. 183-84.*

In 1975 a Consent Decree, *Ex. 53,* was entered in the U.S. District Court for the Northern District of Indiana. It involved, among other things, the staffing at the LCJC, *Id.,* and required a full-time psychologist for each forty-four (44) children, *Id.; Tr. 206,* and a group leader, preferably with a B.A. degree in school psychology, social work or education, for every two (2) children in the LCJC. *Ex. 53; Tr. 206.* One of the duties of the psychologists was to conduct a complete evaluation of each child upon admission to the LCJC. *Id.* During the relevant times the LCJC had only a part-time psychologist, at the LCJC on Tuesdays and Thursdays, and there is no indication that Steven Myers was evaluated by a psychologist when he was admitted to the LCJC on December 7, 1988. *Tr. 432-33.* The defendants' expert, Dr. Macellari, agreed that it makes sense to have every child evaluated by a psychologist upon admission and that one of the purposes of this would be to discover suicidal tendencies. *Tr. 775-76.*

There was no policy at the LCJC requiring staff members to obtain documents from other institutions, such as juvenile detention facilities, where residents had been detained before arriving at the LCJC. *Tr. 204-05.* Amy Byer, an intake officer, testified that she usually did not contact outside sources of information when conducting the intake process. *Tr. 223.*

Mr. Bennett testified that he believed Steven Myers' attempted suicide might have been prevented if there had been additional staff at the LCJC. *Tr. 188-89.* A detention officer at the LCJC, Mr. Sullivan, testified that the LCJC was always understaffed. *Tr. 256.* Prior to January 4, 1989 Mr. Bennett had sought additional staff at the LCJC, but the request was turned down by Lake County. *Tr. 189.* Subsequent to Steven Myers' attempted suicide, Mr. Bennett's request for additional detention officers was approved. *Id.* Steven Myers was in isolation at the time he attempted suicide. *Tr. 191.* A sound-monitoring system was supposed to be turned on whenever a resident was in isolation in his room, but on January 4, 1989 some of the monitors were not working and Mr. Bennett does not know whether it was working in Steven Myers' room at the time of the attempted suicide. *Tr. 191-92.* The resident chart should include an entry or two for each day, but Steven Myers' chart had no entries for December 17, 21 and 28, 1988. *Ex. 1 & A; Tr. 492.* In 1988 there were fifteen (15) suicide attempts or gestures at the LCJC, one as late as December 28, 1988. *Ex. 11; Tr. 198-99.* Mr. Holden, a detention officer and the first LCJC staff member to arrive on the scene of Steven Myers' attempted suicide, *Tr. 140-43,* did not have CPR training even though that was a requirement for LCJC staff. *Tr. 203.*

After three (3) earlier periods of detention at the LCJC, *Ex. 1; Tr. 475-76,* Steven Myers was transferred there, from the Porter County Juvenile Detention Center, pursuant to court order on December 7, 1988. *Tr. 214.* When Steven was at the LCJC in March 1988 he was placed on suicide watch. *Ex. 2 & 7; Tr. 433-34 & 490-91.* The circled "S" on Exhibit 2 indicates suicide watch. *Tr. 490-91.* Mr. Desler, the therapist at LCJC who testified that the records show he talked to Steven Myers on December 7, 1988, did not recall talking to Steven on that date, did not recall if he knew at the time of this conversation that Steven had been on suicide watch in March 1988, and testified that the circled "S" on Exhibit 2 indicated a clothing size. *Tr. 650-52.* The records of Desler's interview in early December 1988 show that he entered the date and the fact that Steven ran from a placement, was being held pending a theft charge, had no long range plans and had been subjected to vocational testing. *Ex. 6; Tr. 429-31.*

Kim Thomas, who was the supervisor of intake at the LCJC and conducted the December 1988 intake of Steven Myers, *Tr. 211 & 213,* did not recall seeking or seeing records from the Porter County Detention Center, where Steven had been detained immediately prior to his transfer to the LCJC. *Tr. 215-17.* These records show that Steven was on suicide precaution at the Porter County facility immediately prior to his transfer to the LCJC. *Ex. 37.* Mr. Titus, a counsellor and clinical director at the Neiquist Center where Steven Myers was a resident in 1988 prior to his transfer to the Porter County Juvenile Detention Center, *Tr. 330; 334; 341,* saw Steven at the Porter County Juvenile Detention Center shortly before

his transfer to the LCJC, *Tr. 364-66,* and testified that Steven's depression would have been "painfully obvious" when he arrived at the LCJC on December 7, 1988. *Tr. 368-69.*

In addition to the fact that Steven Myers was on suicide watch while in the LCJC in March 1988 and while in the Porter County Detention Center immediately prior to his transfer to the LCJC on December 7, 1988, there was other evidence of Steven's suicidal tendencies in documents that would have been available to the LCJC if requested. These include:

1. An April 6, 1988 report prepared by M. Sutton, a caseworker with the Lake County DPW, indicating that "Steven has also spoken of suicide . . . ;" *Ex. 31, § 1;*

2. An April 1988 petition prepared by the DPW and filed in the Juvenile Division of the Superior Court of Lake County, relating to Steven Myers, states that "[t]he child experiences extreme depression and has spoken of suicide;" *Ex. 31, § 1;*

3. A May 1, 1988 "pre-dispositional summary" from DPW caseworkers to Judge Mears states that "[t]he child had been very depressed and has talked of suicide, . . . " and that "Steven has been suicidal;" *Ex. 31, § 1;*

4. An "interagency consultation team" form, dated May 27, 1988 and showing the DPW as the referring agency, indicates Steven is "depressed and has spoken of suicide;" *Ex. 31, § 1;*

5. A "pre-dispositional investigation" report, showing a disposition date of June 9, 1988, indicates that "Mr. Myers feels Steven has suicidal tendencies;" *Ex. 31, § 1;*

6. An "intake information" form, dated August 8, 1988 and signed by David Walker, Youth Services Bureau supervisor, states that Steven "has also talked of suicide;" *Ex. 39;*

7. An undated, unsigned note from the Youth Services Bureau of Porter County file, with Steven's name at the top, indicates "suicidal – self-mutilation;" *Ex. 39;*

8. A Lake County DPW form (2956) dated August 29, 1988, states in section D "child became suicidal;" *Ex. 31, § 1;*

9. An October 4, 1988 report from a psychologist, Richard D. Millar, prepared for the Porter County Youth Service Bureau, indicates that "[s]uicidal ideations or intent should be explored," that "Steve has endorsed specific items indicating suicide has been considered and/or attempted," and that "[a] thorough clinical evaluation is recommended to assess current suicide potential;" *Ex. 40; Tr. 414-18;*

10. A November 17, 1988 form completed by Mr. Walker indicates Steven should be watched closely "for possible run, suicide, theft or other acting;" *Ex. 39;*

11. A letter dated November 1, 1988, from Mr. Titus to Ms. Rigg, refers to Steven as one who is "demonstrating acting out behavior in an attempt to deal with depression and anxiety;" *Ex. 39;*

12. A November 23, 1988 "behavior summary" from the Porter County Juvenile Detention Center refers to "past thoughts" of suicide; *Ex. 37;*

13. A November 23, 1988 letter from Mr. Walker and Mr. Titus to Ms. Rigg states that Steven "is a 16 year old male who is demonstrating acting out behavior in an attempt to deal with depression and anxiety;" *Ex. 39;* and

14. A "pre-dispositional investigation," dated November 1, 1988 but referring to events as late as December 9, 1988, states that "Mr. Myers feels Steven has suicidal tendencies;" *Ex. 31, § 1.*

In addition, there were verbal warnings; these include:

1. During December 1988 Terri Myers contacted Steven's Lake County probation officer, Tom Kacmar, to express her concern about Steven's depression and suicidal tendencies, *Tr. 565-66.*

2. After visiting Steven at the LCJC around mid-December 1988 Robert Myers asked an intake officer about suicide precaution because he was concerned about Steven's condition; *Tr. 597;* the officer reported back to Mr. Myers, on the telephone, indicating Steven would be placed on suicide watch; *Tr. 598.* Mr. Myers referred to this when he was contacted by telephone on January 4, 1989 and informed of Steven's attempted suicide; *Tr. 613-15; 227-28.*

3. Ms. Rigg testified that she discussed Steven Myers' suicidal tendencies with his probation officer, Mr. Kacmar, between October and December 1988 because Steven's father had called her to say he was afraid that Steven would get suicidal; *Tr. 307-08.* Mr. Kacmar told

Ms. Rigg that Steven's father had called him too, expressing the same concerns. *Tr. 309.*

Steven Myers was a ward of the Lake County DPW at the time he attempted suicide. *Tr. 269.* He was scheduled to be transferred to Elan, an institution in Maine, in early January 1989. *Tr. 270-72.* Because of Steven's intelligence, an I.Q. around 135, *Tr. 270,* and her success rate at Elan, around 90%, *Tr. 273,* Ms. Rigg anticipated that Steven would obtain his high school diploma at Elan and she planned to encourage him to attend college. *Tr. 273-74.* Between the date of the attempted suicide and trial, the DPW had paid $243,798 for the care and treatment of Steven. *Tr. 297-98; Ex. 38.* Ms. Rigg testified that the DPW planned to seek a judgment against Steven's parents requiring that they reimburse the DPW for the amount paid on Steven's behalf, *Tr. 304,* and that some bills remained unpaid. *Tr. 298-99.*

SUMMARY OF THE ARGUMENT

Under Indiana law, the petitioner had a nondelegable duty to provide for the care, safety and protection of Steven Myers, it knew or should have known of his suicidal tendencies, and it admittedly might have prevented the attempted suicide if it had complied with the provisions of a Consent Decree relating to staffing. Therefore, there was sufficient evidence for the jury to find negligence.

A number of affirmative defenses, including contributory negligence and incurred risk, were raised in the trial court. Regardless of the "legal pigeonhole" used by

the petitioner, the court of appeals accurately stated the question as whether Indiana would "recognize intentional efforts to commit suicide as defenses to the tort of negligently failing to prevent suicide attempts?" *30 F.3d at 852.* Since Indiana appellate courts have not addressed this question, the court of appeals reviewed the law of other states and concluded: "[w]e think it probable that Indiana would align itself with the majority – not only because the odds favor this, but also because the majority approach is consistent with the rationale of the tort." *Id. at 853.* Whether the prediction of the court of appeals is accurate remains to be seen but, because it did not depart from the usual and accepted course in making its prediction, there is no basis for granting review in this Court.

Under Indiana law Robert Myers, Steven's father, has a cause of action separate and distinct from that of his son. Therefore, each of the plaintiffs is entitled to a judgment in the amount of the statutory maximum under the Indiana Tort Claims Act, $300,000.

Because the court of appeals properly accepted the jury's findings of fact and employed the appropriate standard in determining that Indiana would *not* recognize intentional efforts to commit suicide as a defense to the tort of negligently failing to prevent suicide attempts, this case does not come close to fitting within the considerations governing review on writ of certiorari under Rule 10 of the rules of this Court.

ARGUMENT

When faced with a question of state law that has not been addressed by the state courts, a federal court should resolve it "in the same manner as a federal court resolves an evolving issue of federal law: 'with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law.' " *Salve Regina College v. Russell*, 499 U.S. 225, 227, 111 S.Ct. 1217, 1218 (1991), *quoting Meredith v. Winter Haven*, 320 U.S. 228, 238, 64 S.Ct. 7, 13 (1943). This is precisely what the court of appeals did in resolving the pendent state law issues presented in this case. *30 F.3d at 852-54.*

A. Consistent with the method established by this Court, the Court of Appeals properly predicted that Indiana would not recognize intentional efforts to commit suicide as defenses to the tort of negligently failing to prevent suicide attempts.

Under Indiana law there is a special duty imposed upon those who detain people involuntarily. For example, the Department of Correction has "a duty to take reasonable precautions to preserve the life, health, and safety of prisoners." *Reed v. State*, 479 N.E.2d 1248, 1254 (Ind. 1985). *See also Cole v. Indiana Dept. of Correction*, 616 N.E.2d 44, 45-46 (Ind. App. 1993). "Because of the DOC's unusual ability to control all aspects of its prisoners' lives, the DOC's duty to take reasonable precautions may include an obligation to control the conduct of third persons." *Id. at 46.* In a case more analogous to this, where a severely disabled fourteen-year-old had been

placed in a children's center as a ward of the DPW, the Indiana Supreme Court held that the children's center "had assumed a non-delegable duty to be responsible for the care and safety of [the ward]." *Stropes v. Heritage House Childrens Ctr.*, 547 N.E.2d 244, 253-54 (Ind. 1989). This is consistent with *Restatement, Second, Torts § 314A*, imposing a special duty to aid or protect upon (4) "one who is required by law to take the custody of another such as to deprive the person of normal opportunities for protection." This duty recognized in Indiana requires institutions to use reasonable care in safeguarding patients with suicidal tendencies. *Breese v. State*, 449 N.E.2d 1098, 1103-04 (Ind. App. 1983); *Fowler v. Norways Sanatorium*, 42 N.E.2d 415, 418-19 (Ind. App. 1942). *See also Tittle v. Mahan*, 582 N.E.2d 796, 801 (Ind. 1992) (the "gist of [the plaintiff's] negligence is that the jail defendants failed to (1) monitor the decedent adequately and (2) recognize his tendency toward self-destructive behavior;" summary judgment for the defendants was inappropriate because there remain factual disputes "about whether the jail defendants breached any private duty owed by them to [the plaintiff]").

By statute, it is the policy of the State of Indiana "to insure that children within the juvenile justice system are treated as persons in need of care, treatment, rehabilitation, or protection." I.C. § 31-6-1-1(3). This gives juveniles within the system a right to rehabilitative treatment. *See Nelson v. Heyne*, 355 F.Supp. 451, 459 (N.D. Ind. 1972), *aff'd.* 491 F.2d 352, 358-60 (7th Cir. 1974), *cert. den.*, 417 U.S. 976 (1977). As a secure detention facility, the LCJC must be operated in accord with the rules adopted by the Indiana Department of Correction (DOC). I.C. § 31-6-9-5.

DOC rules require that residents, whenever possible, be classified and segregated according to sex and general behavioral characteristics, that residents' files contain information in keeping with the practices of the Juvenile Court, and that counseling be made available as part of the program from the point of intake. *210 I.A.C. §§ 4-1-2 & 4-1-4.*

The conduct of the defendant, its agents and employees, in this case must be measured against a special nondelegable duty imposed upon government when it decides to confine persons involuntarily. As noted above, Indiana recognizes that this duty of protection extends to the detainee's own acts of self-destruction. This is consistent with general negligence law. *See also Restatement, Second, Torts, § 314A; Liability of Jail for Self-Inflicted Injury, 79 ALR3d 1210, 1216-17 (1977); Suicide of Mental Patient, 19 ALR4th 7, 15-21 (1983).*

After concluding that "Indiana requires institutions to use reasonable care to prevent their wards from committing suicide," *30 F.3d at 850,* the Court of Appeals then addressed the petitioner's argument that "intentional efforts to commit suicide" provide a defense "to the tort of negligently failing to prevent suicide attempts." *Id. at 852-53.* While Indiana has held that the correct "standard of care is the test of a reasonably prudent man suffering from the same maladies and disabilities under like circumstances as those here," and therefore the mental condition and disabilities of the plaintiff must be considered on the issue of contributory negligence *Memorial Hospital of South Bend, Inc. v. Scott,* 300 N.E.2d 50, 56-58 (Ind. 1973), it has not addressed the specific issue presented by this case. Therefore, the Court of Appeals reviewed the

decisions in other states, as well as general law, and predicted that Indiana would align itself with the majority and reject defenses that are "inconsistent with the rationale of the tort." *Id. at 853* ("[w]e think it probable that Indiana would align itself with the majority . . . [and conclude that a] duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided"). The method utilized by the Court of Appeals in predicting how Indiana would resolve this issue is entirely consistent with the decisions of this Court.

B. Consistent with the method established by this Court, the Court of Appeals properly predicted that Indiana would allow a parent and child, who suffer separate injuries, to each recover up to $300,000 under its Tort Claims Act

The Indiana Tort Claims Act, at I.C. § 34-4-16.5-4, provides:

> The combined aggregate liability of all governmental entities . . . does not exceed three hundred thousand dollars ($300,000) for injury to . . . one (1) person in any one (1) occurrence and does not exceed five million dollars ($5,000,000) for injury to . . . all persons in that occurrence.

Because Steven Myers and his father, Robert, suffered separate injury in this case, and have separate and distinct causes of action, each of them is entitled to $300,000.

No one has located an Indiana decision dealing with the precise issue presented here; however, it is clear that a

minor child and his parent(s) have separate causes of action resulting from injury to a child.

> A wrongful act resulting in an injury to a minor child gives rise to *two causes of action*, one in favor of the injured child for personal injuries inflicted and the other in favor of the parent for loss of services.

Buffalo v. Buffalo, 441 N.E.2d 711, 714 (Ind. App. 1982) (emphasis added). *See also Automotive Underwriters, Inc. v. Camp*, 32 N.E.2d 112, 114 (Ind. App. 1941). This holding is supported by the Indiana statute providing for actions involving injury to or the death of a child, I.C. § 34-1-1-8, which provides for an action by parents (subsection (b)) of an injured child and an action by a guardian for the injured child (subsection (d)). In wrongful death actions under this statute, and its predecessor, cases hold that the parents' action "is a separate and distinct action, independent of the wrongful death act." *Andis v. Hawkins*, 489 N.E.2d 78, 82 (Ind. App. 1986). This is consistent with *Restatement, Second, Torts § 703*, which addresses actions by a parent for harm, including loss of services and the expense of medical care, caused by tortious conduct against a minor child. Comment b. states that this liability to the parent is *distinct* from liability to the child. The Idaho and Texas cases cited by the petitioner, *Petition at 13*, are obviously not binding and, even if they were, they would not control this situation because the courts simply held that the statutory maximum is controlling no matter how many beneficiaries there are under the wrongful death statute. There were not separate and distinct causes of action as here.

Since a parent's cause of action for damages resulting from a wrongful act causing injury to his child exists independent of the child's cause of action, Indiana law recognizes separate injury to the parent and child. Therefore, under I.C. § 34-4-16.5-4 the *injury* to Steven Myers is separate and independent of the *injury* to Robert Myers and the trial court correctly directed entry of judgment in the amount of $300,000 for each of the plaintiffs. This result is supported by the fact that in Indiana a father is legally liable for medical care provided to his minor child. *See, e.g., Collection Bureau of Warrick County, Inc. v. Sweeney*, 434 N.E.2d 143, 144 (Ind. App. 1982) ("it is fundamental that a parent owes a duty of providing medical care for a child"); *Scott County School District One v. Asher*, 324 N.E.2d 496, 499 (Ind. App. 1975) ("both parent and child are liable upon suit by the doctor or the hospital, and consequently either may be compensated for the reasonable value of medical expenses"). In this case the Lake County DPW will seek a judgment against Robert Myers, pursuant to I.C. § 31-6-4-18, in the amount of nearly $250,000 to recover the cost of health care for Steven between the attempted suicide on January 4, 1989 and the date of trial. Since Robert Myers has a legal obligation separate and independent of any obligation imposed upon his son as a result of the County's negligence, it follows that Robert Myers has suffered an *injury* separate and independent of that suffered by his son.

Consistent with instruction no. 29 given in this case, the jury awarded Robert Myers $400,000 for all or part of the following elements of damages: loss of services, loss of love and companionship, and the expenses of health care and hospitalization necessitated by Steven's injury.

Steven, pursuant to instruction no. 27, was awarded $500,000 for all or part of the following items: pain and suffering, loss or impairment of earning capacity, the expense of future health and rehabilitative care, and disfigurement. These damage instructions, as well as the verdict form, *R. 82*, to which the defendant did not object, demonstrate the separate and independent nature of the injury to Robert and the injury to Steven.

The Court of Appeals properly concluded that *Andis* and *Buffalo* "are the closest parallels in state law, and . . . that they support the judgment in this case," *30 F.3d at 853-54*, awarding each of the plaintiffs, Robert and Steven Myers, $300,000 under the Indiana Tort Claims Act based on the jury's verdict.

CONCLUSION

For the reasons stated above, it is clear that the court of appeals applied well-accepted principles in predicting how Indiana would decide each of the legal issues presented and concluding that the jury verdict was supported by the evidence and, therefore, the petition for writ of certiorari must be denied.

Respectfully submitted,

TERRY E. JOHNSTON
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1844

IVAN E. BODENSTEINER
7 Napoleon Street
Valparaiso, IN 46383
(219) 464-1162
Counsel of Record

Attorneys for Respondents

APPENDIX

Ind. Code § 31-6-1-1 – **Policy and purpose**

It is the policy of this state and the purpose of this article:

* * *

(3) to insure that children within the juvenile justice system are treated as persons in need of care, treatment, rehabilitation or protection;

* * *

Ind. Code § 31-6-4-18 – **Cost of services; obligation of parent, etc., or county; reimbursement; . . .**

* * *

(b) The parent or guardian of the estate of a child adjudicated a delinquent child or a child in need of services is financially responsible for any services ordered by the court unless:

(1) the parent or guardian is unable to pay for them;

(2) payment would force an unreasonable hardship on the family; or

(3) justice would not be served by ordering payment.

Ind. Code § 31-6-9-5 – **Juvenile detention and shelter care facilities**

* * *

(c) Juvenile detention facilities shall be operated in accord with rules adopted by the department of correction. . . .

Ind. Code § 34-1-1-8 – **Injury or death of child; action be parent or guardian; damages**

* * *

(b) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:

(1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;

(2) in the case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and

(3) a guardian, for the injury or death of a protected person.

* * *

(d) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

(e) In an action to recover for the death of a child, the plaintiff may recover damages:

(1) for the loss of the child's services;

(2) for the loss of the child's love and companionship; and

(3) to pay the expenses of:

(A) health care and hospitalization necessitated by the wrongful act or omission that caused the child's death;

(B) the child's funeral and burial;

* * *

(D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and

* * *

Ind. Code § 34-4-16.5-4 – **Limitation on aggregate liability; punitive damages prohibited**

The combined aggregate liability of all governmental entities . . . does not exceed three hundred thousand dollars ($300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed five million dollars ($5,000,000) for injury to or death of all persons in that occurrence.

ARTICLE 4. JUVENILE DETENTION FACILITIES

210 I.A.C. § 4-1-2 – **Housing**

* * *

(h) Whenever possible, offenders should be classified and segregated according to sex and general behavioral characteristics.

* * *

210 I.A.C. § 4-1-4 – **Care of offenders**

* * *

(n) Counseling shall be made available as a part of the program beginning at intake and continuing through release.

* * *

(q) An offender's file should include information in keeping with the practices of the juvenile court as it pertains to court records. . . . A daily log containing information concerning the offender's behavior and action taken shall be maintained.

* * *

Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ROBERT P. KENNEDY
Counsel of Record
FEISAL AMIN ISTRABADI
SPANGLER, JENNINGS
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

JOHN S. DULL
DULL AND DUGGAN
8300 Mississippi Street
Suite F
Merrillville, Indiana 46410
(219) 769-2875

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

8 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
REPLY BRIEF	1-6

TABLE OF AUTHORITIES

CASES:	PAGE
Beckett v. Clinton Prairie School Corporation, 504 N.E.2d 552 (Ind. 1987)	2
Brown v. Slentz, 237 Ind. 497, 147 N.E.2d 239 (1958)	4
Cole v. Indiana Department of Corrections, 616 N.E.2d 44 (Ind.App. 1993)	3
Erie R. Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	3
McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991)	2
McNall v. Farmers Ins. Group, 423 N.E.2d 593 (Ind. 1981)	4
STATUTES:	
Ind. Code § 34-4-16.5-4 (Burns 1986)	4

No. 94-731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

I.

Unable to defend the merits of the Seventh Circuit's errant Opinion, Respondents argue that the applicability of affirmative defenses to a governmental entity is a question of first impression in Indiana. (Respondents' Brief at 11). This is not true. That affirmative defenses involving a plaintiff's conduct bar liability as to governmental defendants is a well-settled doctrine in Indiana. No Indiana court

has ever questioned this fact. The only issue raised in the instant Petition is whether it was incumbent upon a federal Court of Appeals to apply existing State negligence law, or whether that court was free to conjure legal doctrines, without reference to any principle of Indiana law. Respondents fail utterly to respond to this issue.

Lake County's argument throughout has been that it was entitled to a directed verdict because it had established affirmative defenses involving Steven's conduct as a matter of law. No question concerning the appropriateness of these defenses was raised in the courts below. The Seventh Circuit ignored the issues argued by the parties, instead fashioning a hitherto unknown legal doctrine in the State of Indiana: that a governmental entity charged with negligence may not raise *any* affirmative defenses involving the plaintiff's conduct. Thus, the Seventh Circuit's Opinion, in defiance of existing Indiana law, occurred without the benefit of argument.

In Indiana, if a plaintiff's conduct contributes to his injury, plaintiff is barred from recovering from a negligent defendant, even though that defendant was *in loco parentis*. *Beckett v. Clinton Prairie School Corporation*, 504 N.E.2d 552 (Ind. 1987). Three years ago, the Seventh Circuit held that *Beckett* controlled in a prisoner rape case. *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991). (*See* Lake County's Petition at 8-9).

Neither the Seventh Circuit nor Respondents have shown why it is that *Beckett* properly controlled *McGill*, but has no application whatsoever in the case at bar. Indeed, *Beckett* is not even cited by Respondents in their filing in this Court. The reason for this failure is self-evident: there is no principled argument for distinguishing *McGill* and *Beckett* from this case. Unable to defend this egregiously aberrant Opinion, Respondents chant the mantra of "first impres-

sion" in an effort to minimize the unconscionable overreaching of the Seventh Circuit.

The import of the Seventh Circuit's decision cannot be overstated. The court held that if a defendant is charged with a duty to exercise reasonable care to prevent a suicide, it may not raise plaintiff's contribution to the suicide as an affirmative defense. The same rationale could be used to obviate these affirmative defenses in a simple slip-and-fall case: since the defendant's duty is to exercise reasonable care to prevent plaintiff from falling, defendant should not be able to raise plaintiff's contribution to the fall as a defense. The result is a complete re-writing of Indiana negligence law.

A dichotomy now exists thanks to the Seventh Circuit. Whenever a plaintiff can sue an Indiana governmental unit in federal court, *Myers* can be used to bar defendant from raising affirmative defenses. By contrast, if a plaintiff sues in State court, that court, bound by legislative enactments and precedents of Indiana reviewing courts, would allow governmental defendants to raise such affirmative defenses. This situation is abhorrent to principles of federalism, and the right of states to be the final arbiters of issues of state law. *Erie R. Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The effect of the Seventh Circuit's Opinion is to make governmental entities including schools, hospitals, jails, and prisons, insurers of the safety of their charges. This proposition is contrary to an existing State statute and unanimous case-law of the State of Indiana. (*See* Lake County's Petition at 6-7). Indeed, the Indiana Court of Appeals has recently noted that it is contrary to public policy to hold custodial institutions as insurers of their charges' safety. *Cole v. Indiana Department of Corrections*, 616 N.E.2d 44, 45 (Ind.App. 1993).

Unable to address these arguments, Respondents spend approximately two-thirds of their Brief to show that there was sufficient evidence to support the jury's conclusion that Lake County was negligent. This argument wholly misses the point. The issue is not whether or not Lake County was negligent; it is whether Lake County has the right to raise the plaintiff's conduct as an affirmative defense notwithstanding its negligence. Lake County seeks relief in this Court upon the failure of a federal Court of Appeals to defer to existing State law involving traditional issues of State negligence law. At a time when the nation is engaged in a debate about the limits of federal power over the states, the Seventh Circuit has issued a published opinion eliminating affirmative defenses recognized by a State statute and invariably allowed under State decisional law. Certiorari is appropriate.

II.

In regards to the Seventh Circuit's error in failing properly to enforce limits of liability imposed by Ind. Code § 34-4-16.5-4 (Burns 1986), Respondents repeat the refrain that the father's and son's causes of action in this case are "separate and distinct." (Respondents' Brief at 15). *This is a proposition which Lake County has never disputed.* Instead, it has pointed out that, under Indiana law, a father's claim for loss of services and medical expenses is purely derivative of that of his son. *McNall v. Farmers Ins. Group*, 423 N.E.2d 593 (Ind. 1981); *Brown v. Slentz*, 237 Ind. 497, 147 N.E.2d 239, 240 (1958). Since the father's claim is derivative, it is subject to the same "per-person" limitation as the son's claim.

Respondents again assert that this issue is one of "first impression" as though there has been no Indiana law informative on the question of how many limits apply in

this case. In all other contexts in which Indiana law has been applied both by federal and State courts, the courts have consistently held that a derivative claim is subject to the same single cap as the underlying claim. (*See* Petition at 10-13). There is, therefore, no basis for a federal Court of Appeals to assert that an Indiana court would hold otherwise.

As it did in respect to liability, the Seventh Circuit merely substituted its own judgment, unsatisfied with enactments of the Indiana Legislature and decisions of Indiana courts. Not only does the Seventh Circuit believe itself unbound by Indiana law when deciding issues of State law; it also believes itself to be unbound by United States Supreme Court precedent mandating that existing State law must be applied. Certiorari is appropriate.

III.

Respondents have failed utterly to address Section II of the Petition for Certiorari. In this Section, Lake County set forth errors of law and fact committed by the Seventh Circuit, which tortured and distorted legal principles as well as the record on appeal. Respondents failed to controvert a single assertion of error.

It is self-evident that Respondents failed to controvert these errors because no defense is possible. The Seventh Circuit rewrote Indiana statutes, misstated the facts of cases, misinterpreted the holdings of cases, and committed at least nine egregious errors of fact.

The Seventh Circuit's aberrant behavior is utterly inconsistent with the norms and standards which litigants have a right to expect from a United States Court of Appeals. The Seventh Circuit may believe itself insulated from criticism for the egregious errors which it committed in its Opinion, because of the improbability of certiorari being

granted in any particular case. This indefensible conduct ought itself to be sufficient reason for this Court to exercise its discretion and grant certiorari.

Respectfully submitted,

ROBERT P. KENNEDY
Counsel of Record
FEISAL AMIN ISTRABADI
SPANGLER, JENNINGS
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

JOHN S. DULL
DULL AND DUGGAN
8300 Mississippi Street
Suite F
Merrillville, Indiana 46410
(219) 769-2875

December 1994